(2)

No. 91-869

In The

Supreme Court of the United States

October Term, 1991

DONAL CAMPBELL,

Petitioner,

v.

LENORA DAUGHERTY,

Respondent.

Petition For Writ Of Certiorari
To The Sixth Circuit Court Of Appeals

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the respective Circuits have adopted inconsistent standards as to what may be used to determine clearly established law for purposes of qualified immunity?

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JURISDICTION

The respondent, Lenora Daugherty, originally filed this action in the Middle District of Tennessee. On October 28, 1988, the petitioner filed a motion for judgment on the pleadings and a stay of discovery. By order dated November 9, 1988, the Middle District Court for Tennessee referred to all pretrial matters to the Magistrate. Since the Magistrate considered evidence outside of the pleadings, the petitioner's motion to dismiss was treated as a motion for summary judgment. On April 21, 1989, the Magistrate denied the petitioner's motion for summary judgment on the issue of qualified immunity. On June 14, 1989, the District Court affirmed the decision of the Magistrate. On June 10, 1991, the Sixth Circuit affirmed the District Court, and on August 27, 1991, denied the petitioner's petition for a rehearing en banc on August 27, 1991.

I. IN *OHIO V. SEITER*, 859 F.2d 1171 (6TH CIR. 1988), THE SIXTH CIRCUIT ARTICULATED A DEFINITIVE STANDARD TO BE USED IN DETERMINING WHETHER THE LAW WAS CLEARLY ESTABLISHED FOR PURPOSES OF QUALIFIED IMMUNITY.

In recent years this Court has attempted to articulate guidelines governing the scope and parameters of qualified immunity for government officials. Those officials performing discretionary functions are shielded from liability from civil damages provided their conduct does not violate clearly established statutory or constitutional rights of which a *reasonable person* would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, (1982) (emphasis

added). In other words, government officials are not entitled to an order of qualified immunity if the plaintiff's rights were so clearly established that when the acts were committed, any officer in the defendant's position, measured objectively, would have clearly understood he was under an affirmative duty to refrain from such conduct. *Garvey v. Jackson*, 845 F.2d 647 (6th Cir. 1988). In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court refined the definition of "clearly established" for purposes of establishing qualified immunity:

> It should not be surprising, therefore, that our cases establish that the right of the official that is alleged to have been violated must have been clearly established in the more particularized, and hence more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official action is protected by qualified immunity unless the very action and question has been previously held unlawful, *but it is to say that in light of preexisting law the unlawfulness must be apparent*. *Id*. at 640 (emphasis added).

In *Ohio v. Seiter*, 858 F.2d 1171 (6th Cir. 1988), the Sixth Circuit adopted a definitive standard to guide that Court's inquiry into whether a legal rule was "clearly established" for purposes of qualified immunity. *See also Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989). When conducting an inquiry to determine whether a constitutional right was "clearly established," the lower Court focused initially on decisions of this Court, then to decisions of the Sixth Circuit and finally to decisions of other Circuits:

> [I]n the ordinary instance, to find a clearly established constitutional right, a District Court must find binding precedent by the Supreme Court, its Court of Appeals, or itself. In an extraordinary case, it may be possible for the decision of other Courts to provide such "clearly established law." However, these decisions must point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the minds of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting. *Id.* at 1177.

After applying the foregoing standard to the facts of this case, the Sixth Circuit held that the law with respect to searches of prison visitors was clearly established in 1988. *Daugherty v. Campbell*, 935 F.2d 780, 787 (6th Cir. 1991). In reaching this decision, the Court relied on a Sixth Circuit slip opinion and Circuit Court cases from three Circuits outside the Sixth Circuit. *Id.* at 784-788.

In *Long v. Norris*, 929 F.2d 1111, 1112-13 (6th Cir. 1991), inmates and prison visitors alleged that their constitutional rights were violated by strip and body cavity searches conducted on visitors without probable cause. The Court held that since the plaintiffs specifically alleged the searches were conducted without a prior determination of "probable cause" and not "reasonable suspicion," the law was not clearly established at the time the searches took place. *Id.* at 1115. However, the Court in *dicta* concluded that precedents from other Circuits had uniformly held that strip searches of prison visitors without a predicate finding of "reasonable suspicion" violated

the Fourth Amendment. Accordingly, the Sixth Circuit opined that searches of prison visitors during 1984 and 1985 without at least a "reasonable suspicion" violated clearly established law because any reasonable officer should have known such searches were unconstitutional. *Id.* at 1116.

In this case the Sixth Circuit further relied on case law from three other Circuits to determine that the law in the area of searches of prison visitors was clearly established. *Daugherty v. Campbell,* 935 F.2d at 785, 787. Specifically, the Court relied on *Hunter v. Auger,* 762 F.2d 668 (8th Cir. 1982), *Blackburn v. Snow,* 771 F.2d 556 (1st Cir. 1985) and *Thorne v. Jones,* 765 F.2d 1270 (5th Cir. 1985). In each case the respective Circuits held that under the facts and circumstances virtually identical to those in this case, searches of prison visitors conducted without any predicate finding of reasonable suspicion violated the visitors' rights under the Fourth Amendment. The Court reasoned that the petitioner's conduct in this case has been held unlawful by every Circuit that has considered this very issue since 1982. *Daugherty v. Campbell,* 935 F.2d at 787. Accordingly, the Sixth Circuit held that the prison visitor cases from the other respective Circuits were similar enough to "merit reasonable reliance upon them." *Id.*

In his brief the petitioner alleges that there is a conflict among the respective Circuits as to whether Circuit Court opinions from other Circuits may be utilized in determining clearly established law for purposes of qualified immunity. (See Brief of Petitioner at p. 8-9). The petitioner has cited opinions from seven different Circuits as authority for his position. However, a closer examination of those decisions reveals that none of the respective

Circuits has adopted definitive standards to be used in determining clearly established law which in any way contradicts the guidelines adopted by the Sixth Circuit in *Ohio v. Seiter, supra.*

In *Robinson v. Bibb,* 840 F.2d 349 (6th Cir. 1988), the Sixth Circuit held that a police officer was not entitled to qualified immunity in that case. Although the Court applied a different standard than that articulated in *Ohio v. Seiter, supra,* it should be borne in mind that the *Bibb* decision was decided prior to the *Seiter* opinion. Accordingly, any deviation from *Ohio v. Seiter, supra* by the Sixth Circuit in *Robinson v. Bibb, supra* has likely been overruled.

In *Hobson v. Wilson,* 737 F.2d 1 (D.C. Cir. 1984) the plaintiffs alleged that various F.B.I. agents violated their First Amendment rights to peacefully protest the Vietnam War. *Id.* at p. 8-13. Notwithstanding the fact that the D.C. Circuit posed the rhetorical question of uncertainty as to what standard should be applied to determine well established rights in light of *Harlow v. Fitzgerald, supra,* the Sixth Circuit held that the illegality of the conduct in that case was well established "by any reasonable definition" of "clearly established." *Id.* at 26. Accordingly, the D.C. Circuit declined to define what constituted "well established" law in that Circuit. *Id. See also Zweibon v. Mitchell,* 720 F.2d 162, 169 (D.C. Cir. 1983) wherein the D.C. Circuit declined to define what constitutes "well established" law because the illegal conduct in that case was not clearly established by any reasonable definition of the phrase.

The petitioner is also relying on decisions from the First, Fourth and Tenth Circuits which held that certain novel substantive rights advanced by the plaintiffs in the respective cases were not clearly established due to the inconsistent approaches taken by Circuits. In *Knight v. Mills*, 836 F.2d 659 (1st Cir. 1987), a psychiatric patient alleged that the defendants violated her Constitutional rights by failing to provide her with psychological treatment while committed. *Id.* at 428-29. Since neither this Court nor the First Circuit had addressed that issue, the Court examined the factual circumstances and holdings of two cases outside of the Circuit. *See Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977) and *Ohlinger v. Watson*, 652 F.2d 775 (9th Cir. 1980). The Court concluded that the two Circuit Court cases addressed factual scenarios distinguishable from the circumstances of the case at issue. *Knight v. Mills*, 886 F.2d at 668-9. Accordingly, the Court held that the law regarding psychological treatment for mental patients was not clearly established at the time of the search. *Id.*

In *Hilliard v. City and County of Denver*, 930 F.2d 1516, 1517 (10th Cir. 1991), the plaintiff alleged that the defendant police officers violated her constitutional rights by leaving her stranded in a high crime area where she was robbed and sexually assaulted. Since this Court had not addressed this specific issue, the Tenth Circuit analyzed two Circuit Court opinions from the Seventh and Ninth Circuits. *See White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), *Wood v. Ostrander*, 851 F.2d 1212 (9th Cir. 1988). After examining the factual circumstances and legal holdings of the two opinions, the Tenth Circuit concluded that the state of the law in that particular area was not clear

enough to merit reasonable reliance to create "clearly established" rights. *Id.* at 1520-1521.

Apparently, the petitioner has cited *Knight v. Mills, supra,* and *Hilliard v. City and County of Denver, supra,* for the proposition that the First and Tenth Circuits have adopted definitive standards which foreclose reliance on Circuit Court opinions outside of their own to determine clearly established law. It should be pointed out that in both cases the respective Courts chose not to rely on other Circuit Court opinions because the opinions were factually distinguishable. Furthermore, the respective Circuits had utilized inconsistent approaches in defining the existence of legitimate constitutional rights. The petitioner has cited none and the respondents are not aware of any Circuit Court cases that have absolutely foreclosed the possibility of relying on other Circuit Court definitions of clearly established law. Accordingly, the decisions by the First and Tenth Circuits to reject esoteric or inconsistent substantive case law from other Circuits should not be construed by this Court as a refusal by those Circuits to look to other Circuits under different circumstances.

Finally, in *Wallace v. King,* 626 F.2d 1157, 1158 (4th Cir. 1980) plaintiffs alleged that several police officers conducted a warrantless search of their home in violation of their Fourth Amendment rights. The Court concluded that the cases from other Circuits that had addressed this very issue had not been uniform in their analysis of the underlying substantive law. *Id.* at 1161. Thus, the Fourth Circuit held that in 1976 the law with respect to warrantless searches of residences was not clearly established for purposes of qualified immunity. In *dicta* the Court stated

that law enforcement official should not be held liable for money damages where definitive authority had not been decided by this Court, the appropriate Circuit Court or the highest Court of the State. However, *Wallace v. King* is a 1980 opinion involving 1976 events which was decided prior to *Harlow v. Fitzgerald, supra,* and its progeny. Therefore, this Court should view the foregoing *dicta* with caution.

Like the Sixth Circuit in the instant case, the petitioner has also cited decisions from Seventh and Ninth Circuits which chose to rely on other Circuit decisions in determining that the law was clearly established for purposes of qualified immunity. In *Johnson/El v. Schoemehl,* 878 F.2d 1043, 1052-53 (8th Cir. 1989), the Eight Circuit held that the law was clearly established regarding the conditions and confinement for pretrial detainees. In reaching its decision the Court rejected the Defendant's argument that the Court may not rely on decisions of other Circuits to find clearly established law:

> They argue that for the law to be clearly established, the specific acts of these officials must be particularly prescribed by decisions rendered by this Circuit or another Court with direct jurisdiction over the institution. This rule would enable jail officials to claim immunity where several other Circuit, District, or State Courts had condemned similar practices on the basis of the Federal Constitution. . . . While the identity of a Court and its geographical proximity may be relevant in determining whether a reasonable official would be aware of the law . . . , we do not think the defendants' per se rule adequately captures what the Supreme Court has meant by

its objective tests for what is "clearly established." *Harlow v. Fitzgerald, supra,* (citation omitted). *Id.* at 1049.

Accordingly, the Eighth Circuit held that the case law rendered by the various Circuits merited reasonable reliance sufficient to establish that the law with respect to the confinement of pretrial detainees was clearly established. *Id.* at 1053.

In *Cleveland-Perdue v. Brutsche,* 881 F.2d 427, 432 (7th Cir. 1989), the Seventh Circuit held that the law with respect to the medical treatment of inmates was clearly established in 1975. In reaching its decision, the Court relied on three Circuit Court opinions outside of the Seventh Circuit. *See Newman v. Alabama,* 503 F.2d 1320 (5th Cir. 1974), *Bishop v. Stoneman,* 508 F.2d 1224 (2nd Cir. 1974) and *Finney v. Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974). Since the Seventh Circuit had not addressed that issue, the Court concluded that the factual background and the holdings of the respective cases merited reasonable reliance to establish a clearly established right.

It cannot be disputed that the petitioner has cited the foregoing authorities for the proposition that the Circuits have developed inconsistent and conflicting standards with respect to what case law may be used to determine clearly established law for purposes of qualified immunity. A careful analysis of the factual background and the holdings of these cases reveals that there is no conflict in the Circuits on the issue. The cases cited by the petitioner actually support the respondent's position. In each instance, the Courts looked to the other Circuits for guidance, even though they found nothing they felt to be

controlling. None of the cases cited by the petitioner contains a definitive standard which absolutely forecloses the possibility of relying on case law from other Circuits. The petitioners have merely cited Circuit decisions where- in, the respective Courts *chose* not to rely on authority from other Circuits in determining clearly established law. (emphasis added.) Any refusal to rely on case law from other Circuits by the authorities cited herein should not be construed by this Court as creating conflicting or inconsistent guidelines between the Circuits. Accordingly, the respondent submits that there is no conflict in the Circuits on this issue and the defendant's petition for certiorari should be denied.

II. THE SIXTH CIRCUIT HOLDING IN *DAUGHERTY V. CAMPBELL*, 935 F.2d 780 (6TH CIR. 1991) THAT THE LAW WITH RESPECT TO SEARCHES OF PRISON VISITORS WAS CLEARLY ESTABLISHED IN JANUARY OF 1988 IS CORRECT AND CONSISTENT WITH EACH CIRCUIT THAT HAS ADDRESSED THE ISSUE.

In *Ohio v. Seiter, supra,* the Sixth Circuit adopted definitive parameters to guide any future inquiry into whether a legal rule was "clearly established" for qualified immunity. In the instant case, the Sixth Circuit applied the foregoing standard in reaching its conclusion that the law in this case was clearly established at the time of the petitioner's conduct. *Daugherty v. Campbell,* 935 F.2d 780, 787 (6th Cir. 1991). The Court relied on one District Court slip opinion and three Circuit Court opinions rendered outside of the Sixth Circuit. In *Long v.*

Norris, supra, the Sixth Circuit addressed a factual scenario very similar to the one presented in this case. In *dicta,* the Court concluded that as early as 1984 prison visitors possessed a Fourth Amendment right to be free from unreasonable searches and seizures. Specifically, the Court held that searches of prison visitors may not be conducted consistent with the Fourth Amendment unless a public official had a "reasonable suspicion" that the visitor possessed contraband. *Id.* at 116. Accordingly, the Sixth Circuit concluded that as early as 1984 the law with respect to searches of prison visitors was clearly established. *Id.*

In 1982 the Eight Circuit in *Hunter v. Auger,* 672 F.2d 668 (8th Cir. 1982), rendered its landmark decision with respect to the rights of prison visitors against unreasonable searches and seizures. Under virtually identical facts and circumstances as this case, the plaintiff in *Hunter* was ordered to undergo a visual body cavity search before being permitted a visit. These searches occurred in 1978, ten years prior to the official action in this case. The Eighth Circuit held that the Fourth Amendment mandated that a "reasonable suspicion" standard be adopted to govern strip searches of all prison visitors. *Id.* at 674.

By January of 1988, the Sixth Circuit acknowledged that three different Circuits had addressed the issue of qualified immunity of government officials in the context of searches of prison visitors. *Daugherty v. Campbell,* 935 F.2d at 785-787. In *Smothers v. Gibson,* 778 F.2d 470 (8th Cir. 1985), the plaintiff was ordered to undergo strip searches on seven occasions between December of 1981 and January of 1982. As in this case, the search was based on an alleged uncorroborated informant's tip that the

visitor would be bringing contraband into the facility. Following the mandate of *Hunter*, the Eighth Circuit held that the strip search should have been based on a finding of "reasonable suspicion" before the search would be constitutionally permissible. *Id.* at 472. The Court rejected the defendants' qualified immunity argument and held that the law had been clearly established in this particular area as early as 1981. *Id.* at 473.

The First Circuit in *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), held that a policy requiring all prison visitors to be strip searched without any individualized suspicion clearly violated the Fourth Amendment. In that case, the plaintiff was ordered to submit to strip searches on three occasions in 1977, eleven years before the events in this case. Following the mandate of *Hunter v. Auger, supra*, the Court held that the policy violated the plaintiff's Fourth Amendment rights and a predicate finding of a "reasonable suspicion" was necessary before the strip search could be lawfully conducted. *Id.* at 564-566.

Finally, in *Thorne v. Jones*, 756 F.2d 1270 (5th Cir. 1985), the Fifth Circuit held that a 1977 strip search of a prison visitor without a finding of "reasonable suspicion" violated the Fourth Amendment. Although, the Court unequivocally recognized the unconstitutionality of the officials' conduct, the Fifth Circuit held that the defendant officials were entitled to qualified immunity. *Id.* at 1277. However, in 1977, only one District Court had addressed this issue. *See Black v. Amico*, 387 F.Supp 88 (W.D.N.Y. 1974). In the instant case, the Sixth Circuit held that the facts and the circumstances of the *Thorne v. Jones supra*, case were distinguishable. *Daugherty v. Campbell, supra*, at 786-87. At the time the search took place in the

instant case, each Circuit that has addressed this issue has acknowledged the unlawfulness of the conduct of the state officials under facts and circumstances virtually identical to those presented here. *Id.* Accordingly, the Sixth Circuit concluded that in January 1988, the case law in the area of strip searches of prison visitors provided "an authoritative, 'clearly established' rule forewarning the defendants . . . on the pain of personal liability." (citation omitted) *Daugherty v. Campbell,* 935 F.2d at 786-87.

The petitioner argues that in January of 1988 he was faced with a maze of inconsistent legal decisions on the issue of searches of prison visitors. (See Brief of petitioner at page 10.) Apparently, the petitioner is ignoring the litany of cases relied on by the Sixth Circuit which unequivocally hold that before a search of a prison visitor will pass constitutional muster, the official must make an affirmative finding of "reasonable suspicion" that the visitor possesses contraband. The "reasonable suspicion" standard or some minor variation has become the touchstone of every circuit that has addressed this issue. Undoubtedly, each Circuit that has followed the mandate of *Hunter v. Auger, supra* has pointed unmistakably to the minimum constitutional requisites involved in a search of a prison visitor.

It is axiomatic that the respondent is not attempting to rely on a single idiosyncratic opinion or a handful of novel decisions of other Circuit or District Courts in an attempt to create some abstract constitutional right. *See Eugene D. v. Karmen,* 889 F.2d 701 (6th Cir. 1989) and *Davis v. Holley,* 835 F.2d 1175 (6th Cir. 1987). The case law that has evolved from the Circuits has established a bright

line rule to enable government officials to establish prison visitor guidelines consistent with the Fourth Amendment.

In this case, the very conduct in question has been held unlawful by every Circuit addressing the issue since 1982. The respondent is hard pressed to accept the petitioner's argument that a reasonable official the petitioner's position would not be aware of the existence of the controlling case law on this issue. Accordingly, the respondent submits that the Sixth Circuit's opinion in this case is consistent with the prior pronouncements of the other Circuit Court decisions on the issue of qualified immunity with respect to searches of prison visitors.

III. THE PETITIONER, WARDEN, VIOLATED STATE REGULATIONS EMBODIED IN THE TENNESSEE DEPARTMENT OF CORRECTIONS' GUIDELINES REGARDING STRIP SEARCHES OF PRISON VISITORS, WHICH REGULATIONS HAD BEEN ADOPTED BY THE PETITIONER PERSONALLY FOR HIS INSTITUTION.

In 1982 the Tennessee Department of Corrections established guidelines governing the searches of visitors to penal institutions. *Daugherty v. Campbell*, 935 F.2d 780-81 (6th Cir. 1991). Pursuant to the regulations, a visual body cavity search of a prison visitor may only be conducted upon a finding of *probable cause* to believe the visitor is concealing contraband prior to conducting the search. (emphasis added). *Id.* On July 22, 1986, the petitioner Campbell who was the warden of the Turney Center Correctional Facility personally signed and approved

the Department's 1982 guidelines. *Id.* Specifically, a finding of *probable cause* must be made before a visual body cavity search may be conducted at the facility. *Id.* at 781, n.2 (emphasis added). The "probable cause" standard is a higher standard than the "reasonable suspicion" standard.

In *Spruytte v. Walters,* 753 F.2d 98 (6th Cir. 1985) the Sixth Circuit held that a violation of clearly established state or administrative regulation provided sufficient proof to defeat an official's claim of qualified immunity. As in *Spruytte v. Walters, supra,* the petitioner has violated the same state regulation that created the plaintiff's constitutionally protected interests. In January of 1988, the regulations governing strip searches at the Turney Center Correctional Facility were in full force. At a minimum the petitioner should have been on notice of the minimum requirements of the "reasonable suspicion" standard that had evolved from *Hunter v. Auger,* and its progeny. Accordingly, any argument by the defendant that a reasonable person in his position would not have been aware of the constitutional standards governing the search of prison visitors in 1988 is almost inconceivable.

CONCLUSION

In *Ohio v. Seiter,* 858 F.2d 1171 (6th Cir. 1988), the Sixth Circuit adopted a definitive standard to guide that Court's inquiry into whether a legal rule was "clearly established" for purposes of qualified immunity of public officials. The Sixth Circuit in this case concluded that the law with respect to searches of prison visitors was

"clearly established" in 1988. In reaching its decision, the Court relied on a Sixth Circuit District Court opinion and three Circuit Court cases from outside the Sixth Circuit.

In his brief, the petitioner alleges that there is a conflict among the Circuits as to whether a Circuit Court may rely on opinions for other Circuits to determine clearly established law. However, an examination of the authorities cited by the petitioner reveals that none of Circuits has adopted definitive standards which in any way contradict the guidelines adopted by the Sixth Circuit in *Ohio v. Seiter,* 858 F.2d 1171. The petitioner has cited none and the respondent is not aware of any Circuit Court cases which absolutely foreclose the possibility of relying on other Circuit Court opinions to define "clearly established" law. Thus, the refusal by the Circuit Courts in those cases to rely on opinions outside of their Circuit should not be construed as an adoption of a standard inconsistent with that of the Sixth Circuit.

In this case the Sixth Circuit's holding that the law with respect to searches of prison visitors was clearly established is consistent with every Circuit that has addressed the issue. The petitioner argues that in January of 1988 he was faced with a series of inconsistent decisions on the issue of the standard to be adopted to searches of prison visitors. Apparently, the petitioner is ignoring the progression of the case law adopting the standard of reasonable suspicion or some minor variation.

The conduct at issue in this case has been held unlawful by every Circuit that has addressed the issue

since 1982. Thus, the petitioner's argument that a reasonable official in his position would not be aware of the existence of these rights appears untenable. The unreasonableness of the petitioner's argument is magnified by the fact that he violated Tennessee Department of Corrections guidelines governing searches of prison visitors that he personally approved in 1986. Accordingly, the respondent submits that the Sixth Circuit decision in this case is consistent with prior pronouncements from other Circuit Court decisions upon this issue and that the petitioner's writ of certiorari should be denied.

Respectfully submitted,

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